CHITTENDEN, MURDAY & NOVOTNY LLC

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CLIENT BULLETIN

Has Technology Left the TCPA Behind?
Receipt of Text Messages Leads to Circuit Split on Article III Standing

The Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, has not been updated recently even while technology continues to evolve. Texts messages were not on Congress's radar when the statute was drafted and, even though it could be updated to include current technology, that has not happened. Thus, the receipt of unwanted text messages, among other things, has not been dealt with uniformly by the federal courts.

The issue as to whether the receipt of an unwanted text message – technically a violation of the TCPA – is sufficient to establish Article III standing has been addressed by several of the federal appellate courts, with varying results. The Eleventh Circuit has held that the receipt of a text message is insufficient to establish Article III standing while the Seventh, Ninth, and Second Circuits disagree.

Eleventh Circuit – Single Text is Insufficient for Article III Standing

In *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019), the Eleventh Circuit rebuffed a plaintiff's allegation that the receipt of a single text message on his cellphone was sufficient to sustain a claim under the TCPA because it lacked Article III standing. The court held that "[n]ot every right created by Congress or defined by an executive agency is automatically enforceable in the federal courts." *Salcedo,* 936 F.3d at 1166. "Article III vests the judicial power in the federal courts and extends that power to 'Cases' and 'Controversies.'" *Id.*; U.S. Const. art. III, §§ 1–2. "One tool for determining that the matters before us are truly cases or controversies, as understood by Article III, is the doctrine of standing." *Id.,* citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

"As the Supreme Court has explained, the 'irreducible constitutional minimum' to establish Article III standing requires three elements." *Id.,* citing, *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id*, quoting *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). It is the first element that was addressed by *Salcedo*. "To establish standing, an injury in fact must be concrete." *Salcedo*, 936 F.3d at 1167. A concrete injury must actually exist – *de facto* – it cannot be hypothetical or speculative. *Id*. According to the *Salcedo* court, when this occurs, the Eleventh Circuit looks to "history and the judgment of Congress." *Id*. In making this holding, the court commented that even when Congress creates a statutory right and a private right of action, it does not automatically create Article III standing. After all, *Spokeo* made it clear that a "bare procedural violation" of a statute can result in no harm.

The *Salcedo* court evaluated what Congress said about text messages and the purpose of the TCPA. "We first note what Congress has said in the TCPA's provisions and findings about harms from telemarketing via text message generally: *nothing*." *Salcedo*, 936 F.3d at 1168–69. The court noted that Congress has not amended the TCPA to included texts and "it is only through the rulemaking

authority of the FCC that the voice call provisions of the TCPA have been extended to text messages." *Id.* at 1169. The court found that receipt of a text was "qualitatively different" from the concerns Congress had when it enacted the TCPA, particularly as it related to privacy within a person's home (cellphones are mobile, after all). "And congressional silence is a poor basis for extending federal jurisdiction to new types of harm. We take seriously the silence of that political branch best positioned to assess and articulate new harms from emerging technologies." *Id*., *see Spokeo*, 136 S. Ct. at 1549. The court found that receipt of a text message was perhaps annoying but did not raise the level of a concrete injury.

The court made it clear that its assessment was qualitative, not quantitative. "To be clear, we are not attempting to measure how small or large Salcedo's alleged injury is. Article III standing is not a 'You must be this tall to ride' measuring stick." *Id.* at 1172–7. However, the court seemed to leave the door open to the possibility that multiple texts could form the basis for Article III standing. "To be sure, under our precedent, allegations of wasted time can state a concrete harm for standing purposes." *Id.*

Seventh, Ninth, and Second Circuits – Text Messages are Sufficient for Article III Standing

The Seventh Circuit took the opposite approach in *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458 (7th Cir. 2020). Referencing *Spokeo,* the Seventh Circuit acknowledged that a "bare procedural violation" would not satisfy Article III requirements and that simply because the TCPA authorized a suit does not confer standing. *Gadelhak*, 950 F.3d at 461-2. However, the Seventh Circuit's evaluation of history and Congress's judgment lead to a different result than in *Salcedo*. The Seventh Circuit held that, historically, courts have "recognized liability for intrusion upon seclusion for irritating intrusions" like telephone calls and found that unwanted text messages were analogous. *Id*. The court held that Congress determined "automated telemarketing" posed "the same type of harm to privacy interests" and in doing so Congress had "identified a modern relative of a harm with long common law roots." *Id*. "A few unwanted automated text messages may be too minor an annoyance to be actionable at common law. But such texts nevertheless pose the same *kind* of harm that common law courts recognize – a concrete harm that Congress has chosen to make legally cognizable." *Id*. at 463.

The Ninth Circuit also took the opposite approach to Salcedo in *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017), where the plaintiff alleged he received two unwanted texts. Without much analysis, the court, relying on the Restatement (Second) of Torts, held that "[a]ctions to remedy defendants' invasions of privacy, intrusion upon seclusion, and nuisance have long been heard by American courts, and the right of privacy is recognized by most states." *Van Patten*, 847 F.3d at 1043. The court stated the "TCPA establishes the substantive right to be free from certain types of phone calls and texts absent consumer consent." *Id*. The court deferred to Congress's role in "elevating concrete, de facto injuries previously inadequate in law" to "legally cognizable injuries." *Id*. "Congress identified unsolicited contact as a concrete harm, and gave consumers a means to redress this harm. We recognize that Congress has some permissible role in elevating concrete, de facto injuries previously inadequate in law 'to the status of legally cognizable injuries.'" *Id.* The Ninth Circuit held that Congress wanted to curb unsolicited telemarketing calls and that the texts at issue were the type of harm, and infringed on, "the same privacy interests Congress sought to protect in enacting the TCPA." *Id*. "A plaintiff alleging a violation under the TCPA 'need not allege any *additional* harm beyond the one Congress has identified.'" *Id*.

The Second Circuit's analysis in *Melito v. Experian* Marketing *Solutions*, 923 F.3d 85 (2d 2019) *cert. denied sub nom. Bowes v. Melito*, 140 S. Ct. 677, 205 L. Ed. 2d 440 (2019), largely mirrors that of the Ninth and Seventh Circuits. The Second Circuit held that "text messages, while different in some respects from the receipt of calls or faxes specifically mentioned in the TCPA, present the same 'nuisance and privacy invasion' envisioned by Congress when it enacted the TCPA." *Melito*, 923 F.3d at 93. It also held that text messages have "'a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American Courts.'" *Id.*, quoting *Spokeo*, 136 S.Ct. at 1549. The court held that the receipt of text messages amounts to an injury-in-fact under Article III.

Whether the Eleventh Circuit's decision in *Salcedo* serves to deter plaintiffs from filing suit there for receipt of single, or possibly multiple, text messages remains to be seen.

Chittenden, Murday & Novotny LLC will continue to monitor developments on this issue and report on opinions from the remaining circuits as they arise.

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If you have any questions about this Client Bulletin, please feel free to contact any of the attorneys listed or the CMN attorney with whom you regularly work.

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